APPENDIX "A"

In the United States Court of Claims

(Decided February 20, 1980)

No. 77-74

RICHARD H. GENS v. THE UNITED STATES

No. 78-74

RICHARD H. AND HELEN D. GENS
v. THE UNITED STATES

David S. Fox, attorney of record, for plaintiffs.
Theodore D. Peyser, with whom was *Assistant Attorney General M. Carr Ferguson*, for defendant. *Israel D. Shetreat*, of counsel.

Before DAVIS, NICHOLS, and SMITH, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SMITH, *Judge*, delivered the opinion of the court:

In this consolidated action, plaintiffs sue for refund of income taxes overpaid for the years 1968, 1970, and 1971, which overpayments the Commissioner of Internal Revenue applied to satisfy certain 100-percent penalty assessments made against plaintiff Richard Gens pursuant to section 6672 of the Internal Revenue Code of 1954,[1] and for refund of token payments made by plaintiff Richard Gens[2] with respect to certain other 100-

[1] 26 U.S.C. § 6672 (1976). Hereinafter, all code references are to the Internal Revenue Code of 1954 as appearing in 26 U.S.C. (1976).

[2] "Plaintiff" used hereinafter refers to plaintiff Richard H. Gens unless stated otherwise.

percent penalty assessments. The Government has filed a counterclaim for the unpaid portion of the penalty assessments and for interest assessments made with respect to the penalty assessments. The case is before the court on the Government's motion for summary judgment. The Government asks that the petitions setting forth the refund claims be dismissed and that judgment in its favor be entered with respect to the counterclaim.

In ruling on the Government's motion, the court has considered four issues:

> (1) Is there a genuine issue of fact as to whether the Government misapplied funds received from trustees in bankruptcy as payment of the employment tax liabilities of a group of corporations for which plaintiff has admitted that he was a responsible person under section 6672? We hold that the record before us discloses indisputably that the Government did not misapply these funds.
>
> (2) Is the Government obligated to abate the penalty assessments against Richard Gens to the extent that it has collected penalty assessments arising from the same employment tax liabilities from two erstwhile business associates of this plaintiff? We hold that, at the present time, the Government is not under such an obligation.
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> (3) Was the statute of limitations[3] on collection of the penalty assessments made against plaintiff Richard Gens in 1971 tolled by the filing of an involuntary petition in bankruptcy against this plaintiff? We hold that the running of the period of limitation was suspended by the filing of the bankruptcy petition and that the suspension lasted until 6 months after the bankruptcy court adjudged that Richard Gens was not a bankrupt.
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> (4) Is there a genuine issue of fact as to whether plaintiff Helen D. Gens is entitled to a refund of a portion of the income tax overpayments? We conclude that the facts

[3] I.R.C. § 6502.

in the record before us are insufficient to permit us to answer this question and, therefore, that the action should be remanded to the trial division for it to make appropriate findings of fact with respect to this issue.

This case is a prime example of the inadequacy of the statutory remedies presently available to the Government and to taxpayers in resolving disputes concerning the liability for payroll taxes to which the Government is entitled. The case is otherwise exceptional only because most of the material facts underlying the case are not in dispute. For one or more quarters in 1970, 21 corporations which operated nursing homes failed to pay over to the Federal Government income withholding and FICA taxes (hereinafter referred to as payroll taxes). On March 19, 1971, the Internal Revenue Service (IRS) assessed against plaintiff Richard Gens 100-percent penalties equaling in amount the unpaid 1970 payroll tax liabilities of 14 of these corporations. (Hereinafter these 14 corporations will be referred to as the Massachusetts group.) The 100-percent penalty assessments were made pursuant to section 6672 of the Internal Revenue Code.[4] On March 29, 1971, the Massachusetts group of corporations institutes Chapter XI bankruptcy proceedings in the United States District Court for the District of Massachusetts and were later adjudged bankrupts. On October 18, 1971, a creditors' petition requesting that plaintiff Richard Gens be adjudged a bankrupt was filed in the United States District Court for the District of Massachusetts. On April 3, 1972, the creditors' petition was dismissed, the bankruptcy court adjudging that Richard Gens was not a bankrupt.

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[4] At all times pertinent to this case, section 6672 provided:

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

On January 15, 1973, the IRS assessed plaintiff Richard Gens section 6672 penalties in the amount of the unpaid 1970 payroll tax liabilities of the other seven nursing home corporations. (Hereinafter these seven corporations will for convenience be referred to as the Connecticut group although not all operated in Connecticut.) In 1973, Richard Gens made token payments to the IRS with respect to the Connecticut-group penalty assessments and then filed with the IRS timely claims for refund of the payments. The IRS denied the claims. Also, in 1973, plaintiff Richard Gens and his spouse, plaintiff Helen Gens filed timely claims with the IRS for refund of income tax overpayments made with respect to taxable years 1968, 1970, and 1971. With respect to those years, plaintiffs had filed joint income tax returns. The IRS denied the claims for refund, indicating that the overpayments had been credited against the penalty assessments made against Richard Gens with respect to the Massachusetts group of corporations.

In 1974, plaintiff Richard Gens filed a timely petition in this Court (No. 77-74) for refund of the aforementioned token payments made with respect to the Connecticut group. Concurrently with the filing of that petition, plaintiffs Richard Gens and Helen Gens filed a separate timely petition in this court (No. 78-74) for refund of the aforementioned income tax overpayments.

On January 12, 1977, the United States District Court for the District of Massachusetts ordered the trustees in bankruptcy for the Massachusetts group of corporations to pay the sum of $382,294.52 to the Government to satisfy the payroll tax liabilities outstanding in the names of the corporations of the Massachusetts group. The Government received payment of the aforementioned sum on January 17, 1977. As a result of this collection of the taxes for which the corporations were liable, the IRS abated, on July 6, 1977, the 100-percent penalty assessments which had been outstanding in the name of plaintiff Richard Gens with respect to the 14 corporations of the Massachusetts group. On June 23, 1977, and July 7, 1977,

the IRS transferred the income tax overpayments which had been credited against the Massachusetts-group penalty assessments to credit against the penalty assessments made against Richard Gens with respect to the Connecticut group.

On November 2, 1977, the IRS assessed against Richard Gens interest on the Massachusetts-group penalty assessments, said interest being computed from March 19, 1971, to January 17, 1977, the date it received, from the trustees in bankruptcy, payment of the underlying taxes. On November 30, 1977, the Government filed a counterclaim in this case for the interest assessments and for the unpaid amount of the Connecticut-group penalty assessments. In its brief in support of its motion for summary judgment, the Government revised its computation of the interest assessments so that it now seeks interest on the Massachusetts-group penalty assessments from March 29, 1971, to January 17, 1977.

Plaintiff Richard Gens has admitted that, for 1970, he was a responsible person liable under section 6672 with respect to 20 of the nursing home corporations. With regard to the remaining corporation, the Government has agreed that he was not a responsible person under section 6672.

I.

Plaintiff contends that the Government misapplied the payment which it received from the Massachusetts-group trustees in bankruptcy. Plaintiff argues that, with respect to three Massachusetts-group corporations which operated under names different from the names by which the three were incorporated, the portion of the payment which the Government applied to satisfy the 1970 payroll tax liabilities of the three corporations exceeded $87,522.59 the actual amount of the liabilities. To support his argument, plaintiff refers the court to the Government's counterclaim in this case. In the counterclaim, the Government has erred by treating the three corporations as being six corporations. In other words, the

Government has listed each of the corporations twice, once in the operating name of the corporation and once in the name by which the corporation was incorporated.

The Government acknowledges that it has made this error in its counterclaim. The Government denies, however, that the 1970 payroll tax liabilities of the three corporations were paid twice. To support its denial, the Government points to the order of the bankruptcy court directing the payment which was made by the Massachusetts-group trustees.

We have examined the order of the bankruptcy court and the payment list which it incorporated by reference. The list cited only one name, and not the other, of each of the three corporations. Therefore, none of their payroll tax liabilities was paid twice under the terms of the order. With respect to the manner in which the Government applied the payment which it received pursuant to the order, IRS documents included in the record before us indicate clearly that the payment was applied in accordance with the terms of the order.

Thus, we hold that the Government did not misapply the payment which it received from the Massachusetts-group trustees in bankruptcy.

II.

Plaintiff contends that the Government is obligated, because of IRS Policy Statement P-5-60,[5] to abate the penalty

[5] IR Manual, MT 1218-56 (Feb. 25, 1976), *reprinted in* [1979] 8 STAND. FED. TAX REP. (CCH) ¶ 5509.01. IRS Policy Statement P-5-60 reads as follows:

"The 100-percent penalty (applicable to withheld employment taxes or collected excise taxes) will be used only as a collection device. If a corporation has willfully failed to collect or pay over employment taxes, or has willfully failed to pay over collected excise taxes, the 100-percent penalty will be asserted against responsible officers and employees of the corporation only if such taxes cannot be collected from the corporation itself. If a corporation willfully failed to collect excise taxes, the 100-percent penalty will be asserted against responsible officers and employees of the corporation, provided the taxes have not been collected from the actual taxpayers liable therefor, and the 100-percent penalty cannot be collected from the corporation itself. When court proceedings are involved, an abatement of the tax assessment

assessments made against him to the extent that it has collected penalty assessments arising from the same payroll tax liabilities from two of plaintiff's erstwhile business associates. The Government states that it is willing to and would make such an abatement at such time as its right to retain any collections made from the erstwhile business associates is established.

The record before us discloses that the IRS has in fact collected some penalty assessments from both of the former business associates. With respect to one of the associates, the record discloses that the collection is the subject of a pending lawsuit filed by the associate to obtain a refund of the amount collected. With respect to the other associate, the record discloses that the IRS has refunded to that associate, as part of a settlement involving other years, the amount collected. Nowhere in the record is there any evidence that the IRS has an established right to retain any collection made from either associate.

The Internal Revenue Service is entitled to assess 100-percent penalties against any or all persons liable under section 6672 of the Internal Revenue Code.[6] The Government can enforce these assessments until it has collected successfully an

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against the corporation will be made to the extent that the related 100-percent penalty assessment is paid, with no exception for cases involving fraud or flagrant noncompliance.

"When the person responsible for withholding, collecting and paying over taxes cannot otherwise be determined, the Service will look to the President, Secretary, and the Treasurer of the Corporation as responsible officers.

"In determining the amount of the 100-percent penalty to be assessed in connection with employment taxes, any payment made on the corporate account involved is deemed to represent payment of the *employer* portions of the liability (including assessed penalty and interest) unless there was some specific designation to the contrary by the taxpayer. The taxpayer, of course, has no right of designation in the case of collections resulting from enforced collection measures. To the extent partial payments exceed the *employer* portion of the tax liability, they are considered as being applied against the trust fund portion of the assessment." (Emphasis in original.)

[6] *White* v. *United States*, 178 Ct. Cl. 765, 372 F.2d 513 (1967); *Scott* v. *United States*, 173 Ct. Cl. 650, 354 F.2d 292 (1965).

an amount equal to the payroll tax liability which has given rise to the penalty assessments. Pursuant to the policy embodied in IRS Policy Statement P-5-60, the Government is entitled, through an assertion of 100-percent penalty assessments, only to one satisfaction of the payroll tax liability; once the Government has obtained a single satisfaction, it must abate all 100-percent penalty assessments which have arisen from the payroll tax liability.[7] When the Government seeks satisfaction of the payroll tax liability vis-a-vis an assertion of 100-percent penalty assessments, it is entitled to "choose the liable parties from whom it will collect."[8]

Successful collection by the Goverment of an assessment arising from the payroll tax liability is achieved only when the Government's right to retain an administratively made collection of the assessment is established. It has been held that the right is established "only upon expiration of the statutory period for commencement of a refund suit or, if a refund suit is filed, upon final adjudication of the action."[9] Only when the Government's right to retain an administrative collection is established does it become incumbent on the Government to abate, in the amount of the collection, all 100-percent penalty assessments arising from the payroll tax liability.[10]

In the instant case, the administrative collection made from one of plaintiff Richard Gens' former business associates is the subject of a pending refund action. Thus we hold that plaintiff is not entitled, at the present time, to an abatement in the amount of this collection. The administrative collection made

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[7] *Kelly* v. *Lethert*, 362 F.2d 629 (8th Cir. 1966). The policy of the Government not to increase its coffers by an amount exceeding the payroll tax liability is an acknowledgement that section 6672 operates not as a penalty, but merely as a means of insuring that the Government will be able to collect the amount of payroll tax due it. In the words of Policy Statement P-5-60, "The 100-percent penalty * * * will be used *only as a collection device*." (Emphasis supplied.)

[8] *Abrams* v. *United States*, 333 F. Supp. 1134, 1147 (S.D. W.Va. 1971).

[9] *Crompton-Richmond Co.* v. *United States*, 311 F. Supp. 1184, 1185 (S.D. N.Y. 1970).

[10] *Id.*

from the other associate has been refunded to that associate pursuant to settlement involving other years. We must assume that the Government has acted in good faith in such settlement, there being nothing in the record to indicate otherwise. Cognizant that, ordinarily, the Government may "choose the liable parties from whom it will collect" and that the refund in this case to one of plaintiff's former business associates may be said to be tantamount to an exercise of the power to choose, we hold that plaintiff is not entitled at the present time to an abatement in the amount of the collection refunded to his former associate.

III.

Did the filing of the involuntary petition in bankruptcy against plaintiff suspend, to the time of the adjudication that he was not a bankrupt and for 6 months thereafter, the running of the section 6502 period of limitations on collection of the 100-percent penalty assessments made against plaintiff on March 19, 1971? Plaintiff and the Government agree that, if the answer to the question is affirmative, the Government's November 2, 1977, assessments of interest against plaintiff and its filing of the counterclaim for the assessed interest were not time-barred. Conversely, plaintiff and the Government agree that, if the answer to the question is negative, the assessments of interest and the filing of the counterclaim were time-barred.

Section 6503(b) of the Internal Revenue Code declares that "[t]he period of limitations * * * prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States * * *, and for 6 months thereafter." Treasury Reg. § 301.6503(b)-1 (1956), as amended, T.D. 7121-2 C.B. 411, construes section 6503(b) to require that the control or custody be of "all or substantially all of the assets" of a taxpayer. The congressional purpose underlying the enactment of section 6503(b) has been expressed as follows: "[Sec-

tion 6503(b) suspends the running of section 6502] where assets are in the control or custody of a court because during this time they are not subject to administrative collection procedures."[11]

Plaintiff argues that section 6503(b) requires a case-by-case factual determination of the question whether a bankruptcy court has control over or custody of the assets of an alleged bankrupt. More specifically, plaintiff argues that the *mere* filing of an involuntary petition in bankruptcy does not establish in the bankruptcy court, for purposes of section 6503(b), control over or custody of the assets of the alleged bankrupt. According to plaintiff, the institution of a bankruptcy proceeding does not result automatically in a suspension of the running of section 6502; in order for section 6502 to be suspended, plaintiff argues, the bankruptcy court must *assert* and *exercise* jurisdiction over the assets of the alleged bankrupt. Because plaintiff was adjudicated not to be a bankrupt and because the bankruptcy court never appointed a trustee in bankruptcy with respect to his assets, plaintiff contends that his assets were never, for purposes of section 6503(b), in the control or custody of the bankruptcy court.

The Government argues that the filing of a petition in bankruptcy, even if the petition is involuntary and even if the bankruptcy court dismisses the petition ultimately, does suspend automatically the running of section 6502 and that the suspension lasts for the period prescribed in section 6503(b). With respect to the instant case, the Government argues that section 6502 was tolled from the time of the filing of the petition in bankruptcy against plaintiff to the time of his being adjudicated not a bankrupt and for 6 months thereafter.

The issue presented has not been decided heretofore by this court. In resolving the issue in favor of the Government, we have looked for guidance to two cases: *Acme Harvester Co.*[12] and *McAuley*.[13]

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[11] S. Rep. No. 1708, 80th Cong., 2d Sess. 24-25, *reprinted in* [1968] U.S. Code Cong. & Ad. News 3745.

[12] *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U.S. 300 (1911).

[13] *McAuley* v. *United States*, 525 F.2d 1108 (9th Cir. 1975).

In *Acme Harvester Co.*, a few of the creditors of Acme Harvester Company (Acme) filed in a federal district court an involuntary petition in bankruptcy against Acme. The federal court decided not to adjudicate Acme a bankrupt; however, it never entered an order dismissing the bankruptcy petition. Approximately 6 weeks after the filing of the petition, one of the creditors which had filed the petition filed an action against Acme in a state court. In the action, the creditor sought to recover a judgment on an account owed by Acme to the creditor. Before it filed an answer in the state court action, Acme obtained from the federal district court an injunction prohibiting the creditor from prosecuting the state court action. Armed with the injunction, Acme filed in the state court action an answer setting forth two defenses: the injunction and the pendency of the bankruptcy proceeding.

The state court tried the creditor's action and entered judgment in favor of the creditor. The judgment was appealed by Acme to the highest state appellate court. That court affirmed the judgment, holding that, by the time of the institution of the state court action, the federal district court had relinquished its jurisdiction by declining to adjudicate Acme a bankrupt. From the judgment of the state's highest appellate court, Acme appealed to the United States Supreme Court.

That Court formulated the issue before it as follows: "Should the state court have declined to exercise its jurisdiction when the pending proceeding in bankruptcy was set up in denial of the right to entertain further proceedings in the state tribunal."[14] Interpreting the Bankruptcy Act of 1898, the Supreme Court held that one purpose of federal bankruptcy law was[15]

> to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be

[14] *Acme Harvester Co.* v. *Beekman Lumber Co.*, *supra*, note 12, 222 U.S. at 306.

[15] *Id.* at 307-08.

> administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. * * * Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued * * * * * *

Thus, according to the Court, the jurisdiction in a bankruptcy proceeding was "so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition."[18]

Applying its interpretation of federal bankruptcy law to the particular situation of Acme Harvester Company, the Supreme Court held that, by the time of the institution of the state court action, the federal district court *had relinquished* its bankruptcy jurisdiction through declining to adjudicate Acme a bankrupt. Thus, according to the United States District Court, the prosecution of the state court action was proper.

In *McAuley*, *supra* note 13, the issue presented to the United States Court of Appeals for the Ninth Circuit was not whether the institution of a bankuptcy proceeding resulted at all in the suspension of section 6502 pursuant to section 6503(b), but whether the suspension terminated 6 months after the closing of the bankruptcy estate or 12 months after the date of the first creditors' meeting. In resolving that issue, the court held that section 6503(b) did not require a factual determination of the question of whether a bankruptcy court had control over or custody of all or substantially all of the assets of a taxpayer. The ninth circuit refused to construe section 6503(b) to require such a factual determination because of the difficulty that a court would encounter in making such a determination.

On the basis of the guidance provided by *Acme Harve Co.* and *McAuley*, we conclude that the filing of an involuntary petition in bankruptcy does establish automatically in the

[18] *Id.* at 307.

bankruptcy court, for purposes of section 6503(b), control over or custody of all or substantially all of the assets of the alleged bankrupt. Furthermore, we conclude that where the petition is dismissed through an adjudication that the alleged bankrupt is not a bankrupt, the control or custody of his assets continues to repose in the bankruptcy court to the time of adjudication. Thus, we hold that the running of the section 6502 period of limitations on collection of the Massachusetts-group penalty assessments made against plaintiff Richard Gens was suspended from the time of the filing of the bankruptcy petition against plaintiff to the time of his being adjudicated not a bankrupt and for 6 months thereafter. Because section 6502 was tolled for that period, the November 2, 1977, assessments of interest against plaintiff Richard Gens and the filing of defendant's counterclaim for the assessed interest were not time-barred.

IV.

Plaintiff Helen Gens is seeking a refund of one-half of the income tax overpayments made with respect to the joint income tax returns which plaintiff Richard Gens and she filed for taxable years 1968, 1970, and 1971. The Government has credited the entire amount and the overpayments against the 100-percent penalty assessments made against plaintiff Richard Gens.

It is well settled that "[s]pouses filing a joint return have separate interests in any overpayment, the interest of each depending on his or her income, i.e., an overpayment is apportionable to a spouse to the extent that he or she contributed to the overpaid tax." [17] The IRS itself has acknowledged that "a joint income tax return does not create new property interests for the husband or the wife in each other's income tax overpayment." [18]

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[17] *Rosen* v. *United States*, 397 F. Supp. 342, 343 (E.D. Pa. 1975).

[18] Rev. Rul. 74-611, 1974-2 C.B. 399.

With respect to the instant case, the facts in the record before us are insufficient to permit us to determine whether plaintiff Helen Gens was the source of any portion of the income tax overpayments made with respect to the 1968, 1970, and 1971 joint income tax returns. If her income was the source of any of the overpayments, the Government is not entitled to credit the portion of the overpayments arising from her income against the penalty assessments made against Richard Gens. On the other hand, if the entire amount of the overpayments arose from the income of Richard Gens, the Government is entitled to credit the entire amount against the penalty assessments. We remand that portion of the case to the trial division to make the factual determination of the extent to which Helen Gens was the source of the income tax overpayments made with respect to the 1968, 1970, and 1971 joint income tax returns.

V.

Upon consideration of defendant's motion for summary judgment, together with plaintiff's response thereto, and of the full record before us, without oral argument, we hold that plaintiff Richard H. Gens is not entitled to recover either in No. 77-74 or in No. 78-74, the consolidated case is remanded to the trial division for a determination whether plaintiff Helen D. Gens is entitled to any refund and, if so, in what amount, and of the amount defendant is entitled to recover under its counterclaim. Defendant's motion for summary judgment is allowed in part and denied in part in accordance with these holdings.

APPENDIX "B"

In the United States Court of Claims

(Decided February 24, 1980)

No. 77-74

RICHARD H. GENS v. THE UNITED STATES

No. 78-74

RICHARD H. AND HELEN D. GENS
v. THE UNITED STATES

David S. Fox, attorney of record, for plaintiff.
Israel D. Shetreat, with whom was *Assistant Attorney General Glenn L. Archer, Jr.*, for defendant. *Theodore D. Peyser*, of counsel.

Before KASHIWA, KUNZIG, and SMITH, *Judges*.

OPINION

PER CURIAM: These cases came before the court on plaintiffs' exceptions to the recommended decision, including findings of fact,[1] filed by Trial Judge David Schwartz on April 28, 1981. Upon consideration of those exceptions and the briefs and oral argument by counsel the trial judge's decision is hereby adopted by the court as the basis for its judgment in these cases. Therefore plaintiff Helen D. Gens in case No. 78-74 is not entitled to recover, defendant is entitled to recover $163,504.34 on its counterclaim in No. 77-74, with interest thereon as provided by law, and the petitions in both cases are dismissed.

SCHWARTZ, *Trial Judge:* Overpayments on income taxes by plaintiff husband and wife in 1968, 1970 and 1971 were applied by the Government to penalty assessments against the husband alone. When the plaintiffs brought suit for refund of the overpayments, the Government counterclaimed against the husband for the unpaid portion of the penalty assessments. The court has granted summary judgment for the Government against the husband, Richard H. Gens, and has remanded the case for a determination of any share in the overpayment of the wife, plaintiff Helen D. Gens, and the consequent amount of the counterclaim. *Gens* v. *United States*, 222 Ct. Cl. 407, 615 F.2d 1335 (1980). Any recovery by Helen would diminish the amount of the overpayments properly applied against Richard's liabilities, and thereby increase the amount for which Richard would be liable on the counterclaim. Helen is, however, found to have no right to share in the overpayment, and the amount of the counterclaim stands unchanged.

The question of fact here decided is how much plaintiff Helen Gens contributed to income reported, and overpayments made, on her joint income tax return with her husband Richard Gens in the years involved. The answer is that Helen contributed $2,263 to the income reported and nothing to the overpayments for which the suit seeks refunds. On these facts, the question of law presented is whether a spouse has an interest in an overpayment, on proof of contribution to joint taxable income but not to actual overpayment. The answer is no.

Details of the returns and of the taxes paid and overpaid are contained in the accompanying findings. The relevant facts as to sources of income and overpayments follow.

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[1] Although the court adopts the trial judge's separate findings of fact, which are set forth in his report, they are not printed herein since copies thereof have been furnished to the parties.

The three returns show income from wages, dividends, interest, rentals and gains from sales of securities. For two of the years, W-2 forms attached to the returns show the wages to have been Richard's. No W-2 form is attached for the third year. The schedules for interest and capital gains show that Helen's investments and her share of jointly owned investments generated $76 of the 1968 income and $2,187 of the 1970 income, a total of $2,263.

The source of the overpayments was sums withheld from wages and a cash payment of taxes in 1968. The returns of course do not show the source of the cash payment, whether Helen's or Richard's funds. No cancelled check was produced, and Helen, who was present at trial, did not testify.

Richard Gens, who did testify, could not say of the cash payment in 1968 "where, how, and between whom" it was made. Of Helen's employment, he said only that he and she were employees of companies mentioned in the returns "for a period of time, commencing in the early sixties and ending in the late sixties." Mr. Hyman Silver, a former associate, testified by deposition that Helen was not employed in the years in question. His more precise testimony is accepted. The sum of the evidence is that Helen contributed $2,263 to the income reported and nothing to the overpayments.

On these facts, Helen is not entitled to any of the overpayment. The statute authorizes credit of an overpayment against the liability of "the person who made the overpayment." I.R.C. §6402. The decisions have not been as clear as the Code seems to be that the person meant is the one who actually made the overpayment and not the person who earned the income. *Rosen* v. *United States*, 397 F. Supp. 342, 343 (E.D. Pa. 1975), quoted in the court's opinion remanding the case, held that: "Spouses filing a joint return have separate interests in any overpayment, the interest of each depending on his or her income, i.e., an overpayment is apportionable to the extent that he or she contributed to the overpaid tax." The first half

of the sentence seems to say that income is determinative of the ownership of the overpayment, the second that apportionment is made on the basis of contribution to "the overpaid tax," at least arguably a reference to the overpayment. The facts of the *Rosen* case do not help to resolve the ambiguity, because one spouse was the sole contributor to income and the sole source of income could be assumed to be the sole source of the overpayment. The same is true in Rev. Rul. 74-611, 1974-2 C.B. 399.

This court's opinion on the remand speaks of "overpayments arising from [Helen's] income," and states the question as whether Helen "was the source of any portion of the income tax overpayments" and, again, whether "her income was the source of any of the overpayments." The final statement of the question remanded, however, is "the extent to which Helen Gens was the source of the income tax overpayments." *Gens* v. *United States*, 222 Ct. Cl. 407, 420-21, 615 F.2d 1335, 1342 (1980). This last formulation is taken to mean that the maker of the overpayments is entitled to the credit or refund, as the statute says.

The court's view is that of *Glaubke* v. *United States*, 41 AFTR 2d 78-759 (E.D. Va. 1978) where, as in the present case, the Commissioner was seeking to apply an overpayment on a joint tax return to a separate tax liability of the husband. Both spouses had income and the source of the overpayment was withholding on wages of both. The Commissioner sought to apply the sums withheld on the wife's wages to the joint tax liability, so that the sums withheld on the husband's wages would become the overpayment available to satisfy his separate liability. The court held, rather, that only the husband's proportionate share of excess withholding could be applied to the tax liability. The wife was entitled to a share of the overpayment equal to the ratio of her contributed withholding to total withholding.

Contribution to income was tacitly rejected. Some of the wife's income had not been subjected to withholding. The ratio of her income to total income was thus different from the ratio of her withholding to total withholding. Yet it was the court's decision that the overpayment was to be divided in proportion to the relative contributions of excess withholding constituting the overpayment. The overpayment goes to the maker of the overpayment, not the contributor to income.

Mrs. Gens is therefore not entitled to any part of the overpayment, for failure of proof that she paid any part of it. The entire overpayment was properly applied to the separate tax liability of Mr. Gens. The now settled amount of the counterclaim for the balance of his tax liability is therefore fully payable.

The defendant's motion for summary judgment is denied in the part remaining after the court's order of February 20, 1980. Judgment is entered for defendant for $163,504.38, the amount of the counterclaim, with interest as provided by law.

APPENDIX "C"

ARTICLE V.—AMENDMENTS

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Repealed Title 11, 11 U.S.C. §109. Taking possession of property; receivers

(a) Whenever a petition is filed to have a person adjudged a bankrupt and an application is made to have a receiver or a marshall take charge of the property of the bankrupt, or any part thereof, prior to the adjudication, the applicant shall file in the same court a bond in such amount as the court shall fix, with such surety as the court shall approve, conditioned to indemnify the bankrupt for such costs, counsel fees, expenses, and damages as may be occasioned by such seizure, taking, and detention of such property: *Provided*, That such property shall be released, if the bankrupt shall file a counter-bond in the same court in such amount as the court shall fix, with such surety as the court shall approve, conditioned that he account for and turn over such property or pay the value thereof in money at the time of seizure to the trustee, in the event the adjudication is made.

(b) If the petition for adjudication be dismissed, or withdrawn by the petitioners, the court shall fix and allow to

the bankrupt, to be paid by the obligors on such bond, the costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of his property, in the manner provided by subdivision (n) of section 78 of this title.

(c) The judge of any court of bankruptcy which has jurisdiction over a bankrupt's property within its territorial limits may, in aid of a receiver appointed in a bankruptcy proceeding pending in any other court of bankruptcy, appoint for cause shown one or more ancillary receivers. The primary receiver or, if there be more than one primary receiver, then at least one of them, shall be appointed the ancillary receiver, or, if more than one is appointed, one of the ancillary receivers. Ancillary receivers shall be subject to the jurisdiction of the ancillary court, which shall determine and may allow their costs, expenses, and compensation in like manner as provided in the case of receivers.

(d) Upon the filing of a petition under this title, a receiver or trustee, appointed in proceedings not under this title, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt shall be accountable to the bankruptcy court, in which the proceeding under this title is pending, for any action taken by him subsequent to the filing of such bankruptcy petition, and shall file in such bankruptcy court a sworn schedule setting forth a summary of the property in his charge and of the liabilities of the estate, both as of the time of and since becoming receiver, trustee, assignee, or agent, and a sworn statement of his administration of the estate. Such receiver, trustee, assignee, or agent, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy court. July 1, 1898, c.541 §69, 30 Stat. 565; June 22, 1938, c.575, §1, 52 Stat. 879; July 7, 1952, c.579, §22, 66 Stat. 429.

Repealed Title 11, 11 U.S.C. §110. Title to property

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such

rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

(b) The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the

bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible.[1] A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contractor lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of fraud, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

[1] So in original. Probably should read "enforceable".

(d) After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs—

(1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien upon the property so transferred;

(2) A person indebted to the bankrupt or holding property of the bankrupt may, if acting in good faith, pay such indebtedness or deliver such property, or any part thereof, to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe that the petition in bankruptcy is not well founded;

(4) The provisions of paragraphs (1) and (2) of this subdivision shall not apply where a receiver or trustee appointed by a United States or State court is in possession of all or the greater portion of the nonexempt property of the bankrupt;

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision (g) of section 44 of this title, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however,* That nothing in this title shall impair the negotiability of currency or negotiable instruments.

(e)(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under

any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however*, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

(f) The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employed by the court, receiver, or trustee, the auctioneer must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted.

(g) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

(h) Repealed. July 7, 1952, c. 579 §23(g), 66 Stat. 430.

(i) Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan.

July 1, 1898, c. 541, §70, 30 Stat. 565; Feb. 5, 1903, c. 487, §16, 32 Stat. 800; May 27, 1926, c. 406, §16, 44 Stat. 667; June 22, 1938, c. 575, §1, 52 Stat. 879; Mar. 18, 1950, c. 70, §2, 64 Stat. 26; July 7, 1952, c. 579, §23, 66 Stat. 429; Sept. 25, 1962, Pub.L. 87-681, §§9, 10, 76 Stat. 571, 572; July 5, 1966, Pub.L. 89-495, §5, 80 Stat. 269.

26 U.S.C. §6502. Collection after assessment

(a) Length of period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

(b) Date when levy is considered made.—The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given. Aug. 16, 1954, c.736, 68A Stat. 806; Nov. 2, 1966, Pub.L. 89-719, Title I, §113(b), 80 Stat. 1146.

26 U.S.C. §6503. Suspension of running of period of limitation

(b) Assets of taxpayer in control or custody of court.—The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

26 U.S.C. §6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule.—Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.—

(1) In general.—If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person—

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) **Suit must be brought to determine liablity for penalty.**—If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) **Bond.**—The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1½ times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) **Suspension of running of period of limitations on collection.**—The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) **Jeopardy collection.**—If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

As amended Nov. 10, 1978, Pub.L. 95-628, §9(a), 92 Stat. 3633.